No. 75-1450

In the Supreme Court of the United States

OCTOBER TERM, 1976

IOWA DEPARTMENT OF SOCIAL SERVICES,
STATE OF IOWA, PETITIONER

v.

WEST HEIGHT MANOR, INC.

KEVIN BURNS, COMMISSIONER OF STATE OF IOWA
DEPARTMENT OF SOCIAL SERVICES, and STATE OF
IOWA DEPARTMENT OF SOCIAL SERVICES, PETITIONERS

v.

HUTCHISON NURSING HOME, INC., ET AL.

ON PETITION FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF IOWA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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This brief is submitted in response to the Court's invitation of June 21, 1976.

QUESTION PRESENTED

Whether Medicaid providers that prematurely terminate their participation in a State's Medicaid program must reimburse the State for payments made in anticipation of depreciation.

STATEMENT

The Medicaid program, 79 Stat. 343, as amended, 42 U.S.C. 1396 *et seq.*, is a cooperative state-federal program designed to provide medical assistance to persons with insufficient resources to pay for their own care. A State that participates in the program submits to the Secretary of Health, Education, and Welfare a plan for the provision of assistance (42 U.S.C. 1396a). If the plan is approved and administered in accordance with the Secretary's regulations, the state receives matching payments (42 U.S.C. 1396b).

The statute allows States to reimburse providers of medical care for the "reasonable cost" of services rendered (42 U.S.C. 1396a(a)(20)(D) and (a)(30)), and under the Secretary's regulations the depreciation of a provider's assets utilized in rendering care is part of reasonable cost (20 C.F.R. 405.415).[1] Prior to August 1970 the regulations permitted a provider to calculate its costs using either an accelerated or a straight-line method for calculating depreciation (20 C.F.R. 405.415 (1967)).

On August 1, 1970, the Secretary amended the regulations. Under the new regulations, if a provider that had been using the accelerated method prior to August 1, 1970, terminates its participation in the program after that date, it must repay the difference between any depreciation claimed under the accelerated method and the depreciation that could have been claimed under the straight-line method (20 C.F.R. 405.415(d)(3)).[2]

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[1]20 C.F.R. 405.415 pertains to the Medicare program, but the Medicare regulations also govern "reasonable cost" calculations for the Medicaid program (45 C.F.R. 250.30(a)(2)(i) and (b)(1)).

[2]The August 1970 regulation was amended, 37 Fed. Reg. 4711 (1972), and became effective in May 1972, but this does not affect the analysis here, for respondents and other providers were on notice of the rule no later than August 1, 1970.

The four respondents in these cases became providers before August 1970 and elected to be reimbursed with costs calculated to reflect accelerated depreciation. When respondents canceled their participation in the program before the end of the useful life of the depreciated assets, petitioners sought to recapture the excess payments made as a result of respondents' use of the accelerated method.[3]

The Supreme Court of Iowa held that petitioners may not recoup the excess payments made on account of accelerated depreciation taken before August 1, 1970. The court acknowledged (Pet. App. 3a-8a) that the state statute and regulations provide for no greater payment than is required under federal law. It concluded, however, that federal regulations in effect at the time the payments were made and respondents' contracts as providers were entered into did not provide for recoupment of payments attributable to accelerated depreciation, even when the provider withdrew from the program before the end of the useful life of the depreciated assets (*id.* at 16a-17a). Because, in its view, the 1970 regulation was "a substantive change in the rules governing computation of reasonable costs" (*id.* at 17a), the court held that petitioners are not entitled to reimbursement.[4]

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[3]Three respondents withdrew from the program after August 1, 1970 (Pet. App. 14a), and one ceased providing services before that date (*id.* at 2a).

[4]The court's holding was limited to petitioners' rights to recoup Medicaid payments, and the court ventured no view on the right of the federal government to recapture Medicare payments (Pet. App. 19a).

DISCUSSION

The apparent rationale of the Supreme Court of Iowa is that the August 1970 regulation made a "substantive change" (Pet. App. 17a) in the terms of the bargain between respondent providers and the state agencies that could not constitutionally be applied retroactively.[5] It is far from clear, however, that the August 1970 regulation worked a "substantive change" in the relationship between state agencies and providers of medical services. The statute provided from the beginning that reimbursement cannot exceed "reasonable cost" (42 U.S.C. 1396a(a)(20)(D) and (a)(30)). The 1970 regulation simply provides an operational definition of "reasonable cost" in relation to costs attributable to accelerated depreciation, stating that the cost of payment for accelerated depreciation is not reasonable if the provider withdraws from the program prematurely. To the extent this may be thought to be a revision of the administrative view of the statute, the statute explicitly authorizes the Secretary to make retroactive adjustments when necessary (42 U.S.C. 1395x(v)). Cf. *Szekely* v. *Florida Medical Association*, 517 F. 2d 345 (C.A. 5), certiorari denied *sub nom. Szekely* v. *Mathews*, May 3, 1976 (No. 75-1350). The statutory terms either were part of (*Home Building & Loan Association* v. *Blaisdell*, 290 U.S. 398) or overrode (*Rosado* v. *Wyman*, 397 U.S. 397; *Teamsters Local 24* v. *Oliver*, 358 U.S. 283) any agreement between the state agencies and the providers.

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[5]The court's reliance upon the Constitution is evinced by its citation to *South Windsor Convalescent Home, Inc.* v. *Weinberger*, 403 F. Supp. 515 (D. Conn.), reversed for lack of jurisdiction, C.A. 2, No. 75-6136, July 27, 1976, in which the district court had held that retroactive reasonable cost adjustments are constitutionally impermissible.

But even if the 1970 regulation was a "substantive change" in the rules, "those who do business in the regulated field cannot object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." *Federal Housing Administration* v. *The Darlington, Inc.*, 358 U.S. 84, 91. The providers, having accepted the benefits of the Medicaid program, must also accept the continuing changes necessary to implement the statutory goal of provision of medical services at no more than "reasonable cost." Cf. *Norman* v. *Baltimore & Ohio R. Co.*, 294 U.S. 240, 307-308; *Veix* v. *Sixth Ward Association*, 310 U.S. 32, 38. See also *Bradley* v. *Richmond School Board*, 416 U.S. 696.

Furthermore, even if respondents could be viewed as operating outside a regulated field, they could not successfully argue that all retrospective changes in payment terms or other obligations are unconstitutional. The presumption is the other way. *Usery* v. *Turner Elkhorn Mining Co.*, No. 74-1302, decided July 1, 1976, slip op. 10-15, 20-22. Retrospective application of the August 1970 regulation would be constitutionally impermissible only if it were "harsh and oppressive." *Welch* v. *Henry*, 305 U.S. 134, 147. See also *Curtis* v. *Whitney*, 13 Wall. 68, 70; *Blount* v. *Windley*, 95 U.S. 173, 180; *Lichter* v. *United States*, 334 U.S. 742 (statute requiring renegotiation of government contracts to recapture excessive profits). Where, as here, the providers have accepted payments subject to statutory (42 U.S.C. 1395x(v)), regulatory (Pet. App. 13a), and contractual (Pet. App. 2a) provisions for retrospective adjustment, such adjustments are not "harsh and oppressive." Accordingly, we believe that the judgments of the Supreme Court of Iowa are incorrect.

The question presented here, however, affects the recapture only of payments made to providers before August 1, 1970 (see Pet. App. 7a, 18a-19a), and, although there has been considerable litigation about the recapture of such payments, the question appears to have little prospective importance. The instant cases are the first to be decided by state courts, and there is yet no conflict among the circuits on the merits of the question presented.[6] At least in the absence of such a conflict, we cannot say that the question presented warrants review by this Court.

CONCLUSION

The petition for writs of certiorari should be denied.[7]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

SEPTEMBER 1976.

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[6]Most of the federal cases have involved an analogous problem under the Medicare Act. *South Windsor Convalescent Home*, *supra*, in which the district court had invalidated the August 1970 regulation, was reversed by the court of appeals for want of jurisdiction. No other court of appeals has passed upon the question, although several cases are pending. *Adams Nursing Home of Williamstown, Inc.* v. *Mathews*, appeal pending, C.A. 1, No. 76-1212; *Springdale Convalescent Center* v. *Mathews*, appeal pending, C.A. 5, No. 75-4199; *Hazelwood Chronic and Convalescent Hospital, Inc.* v. *Mathews*, appeal pending, C.A. 9, No. 74-2210; *Summit Nursing Home* v. *United States*, Ct. Cl., No. 89-74.

[7]In the alternative, this Court may wish to vacate the judgment below and remand to the Supreme Court of Iowa for reconsideration in light of the principles set forth in the intervening decision in *Usery* v. *Turner Elkhorn Mining Co.*, *supra*.